No. 76-1408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

RON PAUL, *Petitioner,*

v.

ROBERT ALTON GAMMAGE, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

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I.

THIS CASE IS NOT MOOT.

After Dr. Paul filed his petition for a writ of certiorari in this Court on April 12, 1977, the House of Representatives voted, on May 9, 1977, to dismiss the contest that Paul had filed in the House pursuant to the Federal Contested Elections Act, 2 U.S.C. §§ 381 *et seq.*, (1970). 123 Cong. Rec. H 4187 (daily ed. May 9, 1977).[1] Respondent now argues, incorrectly, that

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[1] The vote on the motion to dismiss the contest filed by Paul (a Republican) was by straight party line. No Republicans voted to dismiss, and only one Democrat voted against dismissing. 123 Cong. Rec. H 4187 (daily ed. May 9, 1977).

the action of the House renders this case moot. (Br. in Opp. 5-7.) [2]

Respondent relies heavily on his argument that the oath he took seating him in the House was not conditioned on the outcome of this litigation, as was the case with Senator Hartke's oath in *Roudebush* v. *Hartke,* 405 U.S. 15 (1972). This reliance is misplaced for several important reasons.

First, as matter of logic, the House can always reverse its decisions to seat Gammage unconditionally should new information come to its attention, as, for example, after a full trial of the issue in the state courts.[3] (*See* Pet. 8-9 & nn. 4-5.) The House does not lose its ability to act pursuant to Article I, Section 4, merely because it has chosen to administer an unconditional oath. It is not the captive of ritual. The words of Jefferson's Manual, explaining the oath that Members of Congress take pursuant to Article VI, Section 3, of the Constitution, state the House's options:

> "The House . . . may defer the oath [of office] when a question of qualification arises . . ., *but it may investigate qualifications after the oath is taken . . ., and after the investigation unseat the Member by majority vote.*" Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 416, 93d Cong., 2d Sess., § 204, at 78 (emphasis added).

Representative Wiggins, citing House precedent, characterized the unconditional and immediate seating of a Member as having "no effect upon the ultimate resolution by the House of the challenge to his seating." 123 Cong. Rec. H 157 (daily ed. Jan. 6, 1977).

In addition, Gammage's mootness argument rests, at bottom, on an attempt to obscure the issue on which review is sought. The issue—both before and after the House's action of May 9—is the constitutionality of Texas' contest procedure. It is not, and never has been, the ultimate authority of the House to decide which candidate to seat. The issue in this case, as in *Roudebush* v. *Hartke, supra,* is whether a state may act to ensure as far it can the integrity of its electoral processes, not whether a house of the Congress has the ultimate power. Just as this Court rejected a mootness argument in *Roudebush* because it was "based on an erroneous statement of the 'basic issue,' " 405 U.S. at 19, it should reject the similar argument made here.

If respondent's mootness argument is valid, then this Court also lacked jurisdiction to hear and decide *Powell* v. *McCormack,* 395 U.S. 486 (1969). Respondent is, by implication, asserting that, once the House decides a question within its authority, as it did when it decided not to seat Representative Powell in the 90th Congress, then judicial review is precluded merely by the fact of the House's decision. In *Powell,*

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[2] Respondent's Brief in Opposition to the Petition will be cited herein as "Br. in Opp." The Petition will be cited as "Pet."

[3] The efficacy of state court inquiries has been demonstrated in this session of Congress. The primary election victory of Representative Richard A. Tonry of Louisiana had been contested by his primary opponent both in the Louisiana courts and in the House. The Louisiana trial court ruled that but for "the irregularities and fraud," Representative Tonry's opponent would have won. Washington Post, May 5, 1977, at A1, col. 4. Representative Tonry subsequently resigned his seat in the House because of "the continuing controversy that has surrounded" his election, and because he had become "convinced" that "there were fraudulent and illegal votes cast" during the election. Letter of resignation of Representative Tonry, 123 Cong. Rec. H 3982 (daily ed. May 4, 1977).

this Court held that the issue of Representative Powell's salary was still live, and it then proceeded to decide the lawfulness of his exclusion from the 90th Congress. Here, the issue of Texas' constitutionally permitted power to establish contest procedures is still live. In neither the instant case nor in *Powell* does the action of the House serve to moot the central issue.

As this Court stated in *Powell,* "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." 395 U.S. at 496. It is still possible for this Court to render an effective order in this case regarding the constitutionality of the Texas contest procedures, and the parties retain a concrete adverseness and personal stake in the outcome of the litigation. See Note, *Mootness on Appeal in the Supreme Court,* 83 Harv. L. Rev. 1672 (1970). With the fundamental preconditions for mootness absent, the instant case is still justiciable and should be decided by this Court.

II.

THE COURT HAS JURISDICTION OF THIS CASE.

Respondent asserts that the decision below "rests upon an independent and adequate non-federal ground." (Br. in Opp. 3.) Respondent is wrong. Petitioner invoked below a state statute, Article 9.01 of the Texas Election Code, that unambiguously gives the state district courts jurisdiction "of all contests of elections" for, among others, "federal offices." The Texas Supreme Court held, in the only passage of its opinion quoted by respondent in this part of his argument (*id.* 5), that this unambiguous statute "is inapplicable to contests of elections of Members of Con-

gress, and any attempt to apply it to congressional elections would be in violation of Article I, § 5 of the Constitution of the United States." (Pet. 9a.) Elsewhere the court said that "as to members of Congress, Article 9.01 is unconstitutional and inapplicable." (Pet. 6a.) The coupling by the court of the concepts of inapplicability and unconstitutionality indicates that the court meant nothing more than to express its view that the unambiguous Article 9.01 could not constitutionally be applied to a congressional election. The court was not construing the statute, as respondent urges, but stating the result of its mistaken reading of the Constitution.

In any event, it is clear that, even if the Texas court is taken to have construed the state statute as not governing elections that on its face it unambiguously covers, that construction is dependent on the federal constitutional claim. To deprive this Court of the power to review a state decision in which a federal claim has been made, a purported state ground must be not only adequate to sustain the decision, but also independent of the federal claim. Respondent so recognizes in his statement of the rule quoted above. Compare *Poulos* v. *New Hampshire,* 345 U.S. 395, 402 (1953). Most favorably for respondent, the case is as if the Texas statute in terms covered "elections . . . for . . . federal offices (to the extent permitted by the United States Constitution) . . . ." If the Texas Supreme Court were to determine that a statute so phrased was inapplicable to congressional elections because of the restrictions of the Constitution, there would be no doubt of this Court's jurisdiction to review its decision. The construction of the statute would not be independent of but dependent on the federal question. Compare

Standard Oil Co. v. *Johnson,* 316 U.S. 481 (1942). Analytically this case is no different.

It should not be forgotten that petitioner no less then respondent rests his claim on the United States Constitution. Petitioner believes that, when the Texas legislature ordained that there should be a state procedure for resolving contests over elections for congressional offices, it was fulfilling the power that it has under Article I, Sections 2 and 4. (Pet. 12-16.) Vindication of that constitutional claim may not be thwarted by "putting forward non-federal grounds of decision that were without any fair or substantial support." *Ward* v. *Love County,* 253 U.S. 17, 22 (1920). For "if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." *Id.* There is no tenable ground for the decision below except the mistaken constitutional ground.

III.

RESPONDENT'S OPPOSITION DEMONSTRATES THAT THE PETITION RAISES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT.

Respondent attempts to show that the decision below is not in conflict with this Court's decision in *Roudebush* v. *Hartke, supra* (Br. in Opp. 7-10), and also that it is consistent with the rulings of other state and federal courts. (Br. in Opp. 10-12.) [4]

[4] In support of his argument that the decision of the Texas Supreme Court is consistent with the rulings of other state and federal courts, respondent cites nine decisions. (Br. in Opp. 11.) Carefully ignored is the fact that *every one of the cases cited* was decided before this Court's decision in *Roudebush*.

For all of his efforts, however, respondent succeeds only in proving the obvious—that *Roudebush* involved an Indiana recount statute, whereas the present case involves a Texas contest statute. We have previously argued that the decision below is contrary to *Roudebush*, and that if this case is not squarely controlled by *Roudebush* the decision below raises an important federal question that has not been but should be decided by this court. (Pet. 5-11.) Nothing in respondent's opposition rebuts either of these propositions.[5]

Respondent's only new contribution is the assertion that a state contest statute would "usurp" the House's power to decide the qualifications of its members. (Br. in Opp. 9-10.) Respondent's argument is based on the language of Article 9.01 *et seq.* of the Texas Election Code, which vests "exclusive" jurisdiction to decide contests in Texas state district courts, language that, in his view, would preclude action by the House. This is plainly incorrect. The jurisdictional language of Article 9.01 (which applies to specified state offices as well as congressional offices) is obviously only an allocation of judicial power among the various Texas courts. It simply precludes other Texas courts (such as county courts or municipal courts) from deciding Texas election contests.

[5] Respondent also quarrels with petitioner's analysis of the contest provisions of other states. (Br. in Opp. 13-15.) Merely as one example of his erroneous interpretation of these provisions, he asserts that the Minnesota statute, Minn. Stat. Annot. § 209.02 (1976), provides for recounts rather than contests. (Br. in Opp. 14 n. 6.) Yet the passage he quotes from the statute specifies that the Minnesota court is to determine the number of votes "legally cast at the election." It is precisely the purpose of a contest to separate the lawfully cast ballots from those unlawfully cast. That is just what the Texas contest provisions at issue here are designed to do.

Moreover, in stressing that the Texas contest procedure is judicial in nature, whereas the Indiana recount provision was non-judicial, respondent misreads the applicable portion of *Roudebush*. In *Roudebush*, this Court was called upon to determine whether the Indiana proceeding was "judicial" in order to determine whether the Federal district court injunction against the Indiana recount proceeding (later effectively vacated by this Court's reversal of the district court) violated the prohibition against injunctions of state judicial proceedings contained in 28 U.S.C. § 2283. Since the proceeding was deemed non-judicial, Section 2283 was held not to be applicable. 405 U.S. at 20-23. This Court characterized its inquiry on the injunction issue in *Roudebush* as "quite apart from the merits of the controversy," *Id.* at 20. In any event, how a state allocates the functions of government among the branches of its government is a matter of indifference under federal law. *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902); *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U.S. 210 (1908).

In short, if respondent's arguments demonstrate anything, it is the importance of the question presented by the petition, an importance that should move this Court to grant the writ of certiorari.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for a writ of certiorari, this Court should grant the petition.

Respectfully submitted,

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